82-644

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No. _____

IN THE

Supreme Court of The United States

ROBERT LEE GRAY,

Petitioner,

vs.

THE UNITED STATE OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX

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Supplemental Appendix

Opinion of Judge Thomas L. MacBride, United States Court for the Eastern District, of April 28, 1981..... 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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ROBERT LEE GRAY, Petitioner,	)	
v.	)	Crim. No. S-78-9
UNITED STATES OF AMERICA, Respondent.	)	

MEMORANDUM AND ORDER

On June 2, 1978, the court, upon a stipulated set of facts, found petitioner guilty of possession with intent to distribute cocaine. See U.S.C. Section 841(a)(1). Petitioner subsequently filed a Section 2255[1/] motion to vacate his conviction and sentence. He contends that

1/ A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(1) evidence used against him was obtained in violation of the Fourth Amendment, (2) he was denied effective assistance of counsel and (3) he was incompetent to enter into the stipulated set of facts or to assist his attorney in preparing his defense.

On February 12, 1981, the court issued an order in which it ruled that petitioner's Fourth Amendment claims were not cognizable in this Section 2255 proceeding, see Court's Order, filed February 12, 1981, at pages 1-2, citing United States v. Hearst, ___F. 2d___, No. 78-3612 (9th Cir. October 17, 1980); United States v. Gray, 626 F.2d 102 (9th Cir. 1980); United States v. Currie, 589 F.2d 993 (9th Cir. 1979), and that petitioner had failed to demonstrate that his counsel had acted in an incompetent manner, see Court's Order, filed February 12, 1981, at pages 2-6, citing, inter alia, Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978)

(en banc), cert. denied, 440 U.S. 974 (1979). Accordingly, the court denied petitioner's Section 2255 motion insofar as it was based on his Fourth Amendment claims and his claim that his counsel failed to provide competent assistance. See Court's Order, filed February 12, 1981, at page 7. In addition, the court granted petitioner leave to file supplemental materials in support of his claims that his counsel had a conflict of interests at the time he represented him, and that he was incompetent to enter into the stipulated set of facts or to assist his attorney in preparing his defense. See Court's Order, filed February 12, 1981, at page 7. The supplemental materials have been filed, and the court is now ready to rule on petitioner's remaining claims.

As a preliminary matter, the court notes that on Februar, 20, 1981, petitioner filed a notice of appeal from the court's

February 12, 1981 order.

> The general rule is that once a notice of appeal has been filed, the lower court loses juridiction over the subject matter of the appeal.... This rule is clearly necessary to prevent the procedural chaos that would result if concurrent jurisdiction were permitted.

Matter of Combined Metals Reduction Co., 557 F.2d 179, 201 (9th Cir. 1977). However,

> (w)here the deficiency in a notice of appeal, by reason of untimeliness, lack of essential recitals, or reference to a non-appealable order, is clear to the district court, it may disregard the purported notice of appeal and proceed with the case, knowing that it has not been deprived of jurisdiction.

Ruby v. Secretary of the Navy, 365 F.2d 385, 389 (9th Cir. 1966) (en banc)[emphasis added], cert. denied, 386 U.S. 1011 (1967). Accord, Leonhard v. United States, 663 F.2d 599 (2d Cir. 1980); United States v. Hitchmon, 602 F.2d 689 (5th Cir. 1979) (en banc); Century Laminating, Ltd. v. Montgomery, 595 F.2d 563 (10th Cir. 1979); Hodgson v. Mahoney, 460 F.2d 326 (1st Cir.),

cert. denied, 409 U.S. 1039 (1972). Contra, Williams v. Bernhardt Bros. Tugboat Serv., Inc., 357 F.2d 883 (7th Cir. 1966); District 65, Distributive, Processing & Office Workers Union v. McKague, 216 F.2d 153 (3d Cir. 1954). The Supreme Court has held that orders in post-conviction proceedings are interlocutory and therefore not appealable unless they are final "as to the whole subject-matter and as to all the causes of action involved." Collins v. Miller, 252 U.S. 364, 370 (1920) [habeas corpus]. See also Andrews v. United States, 373 U.S. 334 (1963) [28 U.S.C. Section 2255]. In the case sub judice, the court's February 12, 1981 order granted petitioner leave to file supplemental materials and did not finally dispose of all issues presented by his Section 2255 motion. Consequently, the order was clearly not appealable, and petitioner's filing of a notice of appeal did not divest the court of jurisdiction over

the subject matter of this action. See Ruby v. Secretary of the Navy, supra. Accordingly, the court will proceed to consider the merits of petitioner's remaining claims.

Counsel's Alleged Conflict of Interests

Petitioner and his co-defendant, Marie Patzig, were represented by the same counsel, James M. McCabe. Petitioner asserts that "(t)he fact that Marie Patzig was never charged with a crime indicate(s) that either McCabe was able to work a deal with the U.S. government at the expense of (petitioner) or that Marie Patzig was involved with Surprison (the government informant) in setting up (petitioner) for said arrest, all with the knowledge of Attorney McCabe." See Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. (Section) 2255, filed October 27, 1980, at page 3.

The Ninth Circuit has stated that:

> While it is established that criminal defendants have a Sixth Amendment right to the assistance of counsel unburdened by conflicting loyalties, it is also clear that there is no per se rule against joint representation. We have held that "until an actual conflict is shown to exist or can be reasonably foreseen an attorney may, in good faith, represent both defendants...."
>
> We recently affirmed "(t)he long established rule in this circuit ... that to prevail on (a conflict of interest claim), the defendant has the burden of establishing that the joint representation in fact created an actual conflict of interst and prejudiced (his) defense." Thus, the defendant must demonstrate "that specific prejudice has resulted to him from the alleged conflict of interest."

Willis v. United States, 614 F.2d 1200, 1202-03 (9th Cir. 1979) (citations omitted).

As previously stated by this court:

> Petitioner's allegation that his attorney either negotiated with the government to drop the charges against Patzig in return for a conviction of petitioner or that petitioner was "set up" by Patzig and Su(r)prison with his attorney's knowledge, if proven, would establish an actual conflict of interest.

> These allegations are conclusory, however, and petitioner will be given (an opportunity) to support them with affidavits.

See Court's Order, filed February 12, 1981, at page 7. In support of his conflict of interests claim, petitioner has filed his own affidavit and that of United States Magistrate Paul Gervais.

Petitioner's affidavit merely establishes that he retained Mr. McCabe at Ms. Patzig's suggestion, that both he and Ms. Patzig were advised to sign for the money seized at his residence so that it could be used for attorney's fees, that Mr. McCabe assured him that he would get the case "dropped," that the charges against Ms. Patzig were dismissed, and that it is petitioner's subjective belief that Mr. McCabe "was not representing (him) but just (Ms. Patzig)." See Affidavit of Robert Lee Gray, filed March 3, 1981. These declarations fail to supply any "objective proof" of either the existence of an actual conflict

of interests, or the presence of actual prejudice resulting from joint representation; accordingly, petitioner's affidavit fails to demonstrate that he is entitled to have his conviction vacated. Id. at 1205.

Magistrate Gervais' affidavit merely establishes that he was in his office until 4:00 p.m. on the day petitioner's house was searched, and that therefore, he was available for the purpose of obtaining a search warrant until that hour. See Declaration in Support of Motion to Vacate Conviction, filed March 3, 1981. Petitioner argues that had Mr. McCabe "not had a conflict of interest, (he) could have by proper use of discovery obtained the testimony of (the magistrate) so as to dispute the issue of exigent circumstances relied upon by the government to justify a warrantless (search)." See Declaration in Support of Motion to Vacate Conviction, filed March 3

1981. However, there is nothing in the record which indicates that Mr. McCabe's failure to obtain this testimony resulted from a conflict of interests of petitioner and Ms. Patzig. Regardless of any possible conflict in other areas, suppression of the evidence seized at petitioner's residence would have benefited both defendants. Magistrate Gervais' affidavit thus fails to supply any support for petitioner's conflict of interests claim.[2/]

There being nothing more than conclusory allegations to support the claim, the court will deny petitioner's motion to vacate his conviction insofar as it is

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2/ Further, the magistrate's declaration that he was in his office until 4:00 p.m. on the day of the search is consistent with the testimony of the agents involved in the search. See United States v. Gray, 626 F.2d 102, 104 (9th Cir. 1980). Thus, no substantial prejudice resulted from counsel's failure to obtain the magistrate's testimony at the time of the supression hearing. Consequently, the magistrate's affidavit is insufficient to support petitioner's claim that he was denied competent assistance of counsel. See Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978)(en banc), cert. denied, 440 U.S. 974 (1979).

based on his conflict of interests claim.

Petitioner's Competence to Enter into the Stipulated Set of Facts or to Assist his Attorney in Preparing his Defense

Petitioner contends that he was incompetent to enter into the stipulated set of facts or to assist his counsel in preparing his defense. The Supreme Court has established the following standard for determining a defendant's competency to stand trial in federal court:

> whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him.

Dusky v. United States, 362 U.S. 402 (1960).

As this court previously stated:

> Petitioner's claim that he was unable to assist his counsel in preparing a defense and that he was incompetent to enter into a stipulation of fact is contradicted by everything in the record before this court. Petitioner stated on the record shortly before entering into the stipulation that, although he had a

> back injury for which medication was prescribed, he had specifically regrained from taking that medication for one week prior to the hearing. Reporter's Transcript (of the Proceedings of June 2, 1978 and January 4, 1979, filed January 31, 1979)(hereafter RT) at 3. Counsel for petitioner stated, in response to questions from this court, that he considered petitioner competent to proceed. Id. This court's observations confirming petitioner's alertness and articulate participation in court proceedings appear in the record. Id.

See Court's Order, filed February 12, 1981, at page 2. The court determined that petitioner should be given an opportunity to supply support for his claim of incompetence, and the court therefore granted him leave to file affidavits supporting the claim. See Court's Order, filed February 12, 1981, at page 2.

In support of his claim of incompetence, petitioner has now filed medical reports prepared by two physicians, Dr. Phillip Hugh Hay and Dr. Howard B. Emery. The report of Dr. Hay merely indicates that he began

treating petitioner a few months after the trial, and that petitioner suffered from "an unrecognized depression for a time." The report of Dr. Emery merely indicates that petitioner was examined by a psychologist within the last two months, and that the psychologist "feels that there is some evidence of a serious thought disorder and severe depression to the point of psychosis." There is nothing in either medical report which demonstrates that at the time of petitioner's trial he was suffering from a mental disorder of such a magnitude that he lacked "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," or that he could not have had "a rational as well as factual understanding of the proceedings against him." See Dusky v. United States, supra. The medical reports thus fail to contradict the record before the court, a record which clearly demonstrates

that petitioner was competent to stand trial. See RT. The court will, therefore, deny petitioner's motion to vacate his conviction insofar as it is based on his claim of incompetence.

The court has now denied petitioner's motion to vacate his sentence on each of the grounds presented by his motion. For the reasons stated above, and for the reasons stated in the Court's Order of February 12, 1981,

IT IS ORDERED that petitioner's Section 2255 motion to vacate his conviction and sentence is hereby denied.

IT IS FURTHER ORDERED that petitioner appear before the court on May 4, 1981 at 9:30 a.m.

IT IS FURTHER ORDERED that petitioner remain released on bail until May 4, 1981.

DATED: April 28, 1981.

/s/ T.J. MacBride
UNITED STATES DISTRICT JUDGE

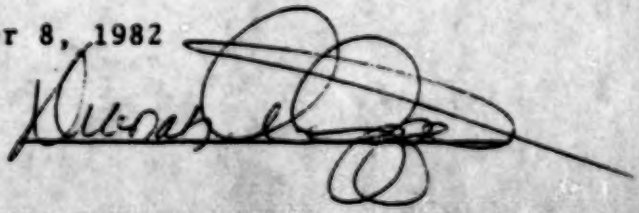
CERTIFICATE OF SERVICE

I, Deborah A. Appel, a citizen of the United States over eighteen (18) years of age, hereby certify that on this 8th day of October , 1982, I served copies of the foregoing "Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit - Supplemental Appendix" upon the Solicitor General, Rex E. Lee, Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20530.

I, Deborah A. Appel, do further say as follows:

That on October 8, 1982, I depostied in a United States Post Office with first class postage prepaid, and properly addressed to the United States Supreme Court, this Supplemental Appendix to the Writ of Certiorari, in the County of Sacramento, State of California.

Dated: October 8, 1982



Sworn to and subscribed before me on the aforementioned date.

Betty S. Nakayama